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# Ticking boxes: decision-making in Employment and Support Allowance

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⚖ Appeals; Complaints; Employment and support allowance; Work capability assessments

*Since its introduction in 2008, Employment and Support Allowance (ESA) has been the subject of much criticism and concern that the mechanisms for assessing claims are unjust. Some of this criticism has been backed up by the first independent review of the assessment process. Thirty years ago Mashaw argued that models of justice could be used to identify “those qualities of a decision process that provide arguments for the acceptability of its decisions”.<sup>1</sup> Based on a small piece of empirical research amongst welfare rights advisers, this article uses Mashaw’s framework to examine the groundswell of opinion that decision-making in ESA is unacceptable.*

## Introduction

Following concerns about increasing numbers of people claiming Incapacity Benefit, Employment and Support Allowance (ESA) was introduced in 2008 for new claims.<sup>2</sup> There were two policy intentions: to reduce the number of successful claims and to introduce to a new element of conditionality so that most of those who qualified would be expected to make efforts to return to the labour market. Although there was some cautious welcome of the principle that people with health problems should not be “written off”, policy analysts predicted that the key problems with ESA would be with this conditionality.<sup>3</sup> However, experience of the early implementation of the system has shown that overwhelming numbers of people are failing to qualify for the benefit at all. Statistics show that, of completed

\*The author would like to thank the fourteen organisations which took part in this research, the Socio-Legal Studies Association for providing funding for the expenses involved in this project, and Michael Adler for his helpful comments on an earlier draft of this article.

<sup>1</sup> J. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven: Yale University Press, 1983).

<sup>2</sup> ESA initially applied only to new claims but, starting with a series of pilots in October 2010, all existing claims for Incapacity Benefit will be transferred to ESA.

<sup>3</sup> E.g. M. Adler, “The Justice Implications of Activation Policies in the UK” in T. Erhag, S. Stendhal and S. Devetzi (eds) *A European Work-First Welfare State* (Göteborg: University of Göteborg: Centre for European Research, 2008); C. Bambra and K. E. Smith “No Longer Deserving? Sickness Benefit Reform and the Politics of (Ill) Health in the UK” (2010) 20 *Critical Public Health* 71–84; N. Barker and S. Lamble “From Social Security to Individual Responsibility: Sanctions, Conditionality and Punitiveness in the Welfare Reform Bill 2009 (Part One) — Current Developments” (2009) 31 *Journal of Social Welfare and Family Law* 321–32; D. Bonner, “Employment and Support Allowance: Helping the Sick and Disabled to Return to Work?” (2008) 15 J.S.S.L. 123–50; N. Harris “Reducing Dependency? Conditional Rights, Benefit Reform and Drugs” (2010) 37 *Journal of Law and Society*; R. Sainsbury “Administrative Justice, Discretion and the ‘Welfare to Work’ Project” (2008) 4 *Journal of Social Welfare and Family Law* 30, 323–38.

claims, 34 per cent of people were awarded benefit, while the remaining 66 per cent were found fit for work.<sup>4</sup> This suggests that the most contentious aspect of ESA, so far, has not been with the new conditionality but with the initial assessment of “capacity for work”. Third sector organisations have been vocal in their criticism of ESA assessments<sup>5</sup> and the first independent review of the assessment procedure has confirmed that there are many problems with it.<sup>6</sup>

It is not surprising that large numbers of people have failed to qualify for ESA, since this was the policy intention. However, criticism of the implementation of ESA suggests that the mechanisms for assessing claims do not appear “fair”. Given these criticisms, it is useful to consider assessments for ESA using “models of justice” as described by Mashaw<sup>7</sup> and developed more recently by Adler<sup>8</sup> and Sainsbury.<sup>9</sup> Theoretical interest in models of justice dates back to Mashaw’s work in the early 1980s. In his book, *Bureaucratic Justice*, Mashaw attempted to understand why it was that people criticised the American disability benefits system for being “unjust”. He found that people criticized the system for different reasons and suggested that models of administrative justice would show that these different viewpoints reflect different normative values. Systems of administration could be judged by reference to “moral judgement”, “professional” or “bureaucratic” models of administrative justice. Mashaw argued that the moral judgement model would hold up the values of fairness, objectivity and the independent weighing-up of potentially contradictory evidence, values usually found in courts and legal procedures. The professional model would hold up values usually to be found in the fields of professional practice where the focus would be on therapy and support for individual clients and concerned with discretionary judgements about matters that are inherently uncertain. The bureaucratic model of justice, on the other hand, would be concerned with consistency of decisions across many cases and would hold up values of efficiency and accuracy, requiring cost-effective decision-making and reliance on technocratic distinctions between true and false claims. Mashaw argued that these models of justice were competitive: promoting the values inherent in one would be at the expense of values inherent in another. This, he argued, could help us to understand the different types of criticism levied at the US disability benefit system at that time, but could also be applied to other aspects of public administration. Adler’s more recent reworking of these models extended them to reflect the changes in public administration from professionalism and bureaucracy to the new managerialism of the 1990s, adding “managerialist”, “consumerist” and “market” models to Mashaw’s original three.<sup>10</sup> Adler’s version of the models

<sup>4</sup> DWP statistical release, October 2010. Available at [http://research.dwp.gov.uk/asd/workingage/esa\\_wca/esa\\_wca\\_26102010.pdf](http://research.dwp.gov.uk/asd/workingage/esa_wca/esa_wca_26102010.pdf) [accessed January 2011].

Note that these figures do not include a further 36 per cent of all claims which are “closed before assessment”, some of which relate to short-term illness but also include others where claimants have failed to provide information or attend medical examinations.

<sup>5</sup> K. Dryburgh, *Unfit for Purpose: Evidence on Employment and Support Allowance (ESA) from Scottish Citizens Advice Bureaux* (Edinburgh: Citizens Advice Scotland, 2010); S. Royston, *Not Working: CAB Evidence on the ESA Work Capability Assessment* (London: Citizens Advice, 2010); DWP, *The Work Capability Assessment: A Call for Evidence* (London: DWP 2010).

<sup>6</sup> M. Harrington, *An Independent Review of the Work Capability Assessment* (London: The Stationery Office, 2010), p.6.

<sup>7</sup> J. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven: Yale University Press, 1983).

<sup>8</sup> M. Adler, “Fairness in Context.” (2006) 33 *Journal of Law and Society*: 615–38.

<sup>9</sup> R. Sainsbury, “Administrative Justice, Discretion and the ‘Welfare to Work’ Project”.

<sup>10</sup> M. Adler, “Fairness in Context”.

of justice renamed the “moral judgement” model as a “legal” model, reflecting the legal values inherent in the model. Adler’s discussion of models of justice also shows how each model of justice is typically associated with a different mode of redress. Sainsbury’s critique of Adler argues that Mashaw’s original models are still valid and that the managerial changes of recent years can still be encompassed by the bureaucratic model, particularly in relation to social security. Sainsbury agrees with Adler, however, that looking at different modes of redress can help our understanding of models of justice.<sup>11</sup>

Mashaw said that models of justice could be used to identify “those qualities of a decision process that provide arguments for the acceptability of its decisions”.<sup>12</sup> This article uses Mashaw’s framework to examine the groundswell of opinion that decision-making in ESA may not be acceptable. The article looks first of all at the history of assessing capacity for work in the UK and the changes brought about by ESA, arguing that, while assessments have become increasingly bureaucratic, they are underpinned by inherent moral claims. Following a description of the empirical research behind it, the article moves on to look at criticisms of decision-making in ESA. It then considers two grievance mechanisms available to dissatisfied claimants: appeals and complaints procedures, which exemplify different models of justice. Finally, the article considers recent policy developments and concludes that, while decision-making in ESA clearly represents a bureaucratic model of justice and can be criticised from either a professional or legal perspective, it may fail even in its own bureaucratic terms.

## Assessing capacity for work in the UK social security system

Incapacity benefits in the UK are determined within a framework of rules and without a specific limit on budgets. Traditionally, claimants of incapacity benefits have had to satisfy two types of test in order to qualify for benefits: a test of their “incapacity for work” and an assessment of their eligibility for the benefit, based either on national insurance contributions or on means-testing.<sup>13</sup> So long as these two sets of rules are satisfied, then claimants are *entitled* to statutorily defined levels of benefit and have rights of appeal against refusal to an independent tribunal, introducing elements of legalism to the process. This article focuses on the first of these tests, relating to whether the claimant is incapable of work.

Until the 1990s, assessment of claims for, the then-named, Invalidity Benefit, relied mainly on assessments by GPs, backed up by checks by the Benefits Agency Medical Service in cases where there was doubt. The assessment of capacity for work was based on an assessment of the claimant’s ability to do a real job “having regard to age, education, experience, state of health and other personal factors” confirmed by a Commissioner’s decision, *R(S)11/1951*. The first major change to this system came in 1995 when Invalidity Benefit was replaced by Incapacity Benefit, bringing in the “All Work Test” which relied instead on a medical assessment by a Benefits Agency doctor, using a system to allocate points for different levels of impairment and a minimum threshold which claimants had to

<sup>11</sup> R. Sainsbury, “Administrative Justice, Discretion and the ‘Welfare to Work’ Project”.

<sup>12</sup> J. Mashaw, *Bureaucratic Justice*, p.24.

<sup>13</sup> ESA, like its predecessor, Incapacity Benefit, has both contributory and means-tested elements but the assessments of “incapacity for work” are the same for both elements.

reach to qualify. This test was criticised at the time for focussing on medical assessment of impairment and not on the day-to-day realities of claimants' lives.<sup>14</sup> Recognising some of the problems with the test, some minor changes were made to the assessment for mental health and it was rebranded the "Personal Capability Assessment" in 2000, but the principles of a points system remained. Around the same time, the task of carrying out medical assessments for Incapacity Benefit was outsourced to a private company, now Atos Healthcare.

ESA kept these principles but with a tightening of the criteria for the now renamed "Work Capability Assessment" (WCA) and a reduction in the range of conditions which lead to exemption from the medical test.<sup>15</sup> The WCA has an additional function: instead of distinguishing between claimants who are "fit for work" and those who are not, it is used to classify claimants in one of three ways: as "fit for work" and therefore not eligible for ESA, as having "limited capacity for work" and therefore subject to conditionality in work activity, or as having "limited capacity for work-related activity" with no conditionality attached.<sup>16</sup> The WCA is similar to the previous Personal Capability Assessment in that it is based on a series of "descriptors" which outline a range of functional impairments (either physical or mental). Each descriptor carries a range of points (between 6 and 15) which, if they add up to 15 or more, classify a claimant as having "limited capacity for work".<sup>17</sup> The WCA has tightened the descriptors severely in order to raise the level of impairment necessary to qualify for the benefit.<sup>18</sup> Another change brought in at the same time as ESA was a change to the medical assessment procedure where doctors carried out assessments to one where assessments are carried out by "approved health care professionals": doctors, nurses and physiotherapists who are required to have at least three years experience and who are required to take part in specific training provided by Atos. All professionals must also be approved by the Chief Medical Adviser to the DWP.

## Capacity for work and moral claims

Discourse on assessments of capacity for work in the UK social security system, has centred on improving the "objectivity" of assessment procedures, with attempts to move away from GPs' alleged subjective assessments to mechanisms which can provide more technocratic and scientific decisions. Research on the GP's role in assessing capacity for work shows that doctors do not find such an assessment

<sup>14</sup> Disability Alliance, Response to "A Consultation on the Medical Assessment for Incapacity Benefit" (London: Disability Alliance Educational Research Association, 1994).

<sup>15</sup> Under Incapacity Benefit, a list of health conditions, including certain physical impairments, being registered blind, having a "severe mental impairment" and being in receipt of the higher rate of Disability Living Allowance Care Component led to exemption from medical assessment. Under ESA this list has been drastically reduced to include essentially only people diagnosed with a terminal illness, people receiving certain types of chemotherapy and hospital inpatients. (The Employment and Support Allowance Regulations 2008 (SI 2008/794), reg.20).

<sup>16</sup> Welfare Reform Act 2007 s.9.

<sup>17</sup> The Employment and Support Allowance Regulations 2008 (SI 2008/794), Sch.2.

<sup>18</sup> For further details of the introduction of the WCA and how it differs from the PCA see D. Bonner, "Employment and Support Allowance: Helping the Sick and Disabled to Return to Work?" (2008) 15 J.S.S.L. 123–50.

so simple, highlighting the complexity of the task and the uncertainty inherent in professional decision-making.<sup>19</sup> This is what we would expect from Mashaw's description of a professional model of administrative justice.

When we look at the introduction of the first "all work" test for Incapacity Benefit in 1995, we can see that the test was one which identified people with particular levels of impairment. It was not a measure of "employability" as such but was designed explicitly to identify people whose impairments suggested that it would not be reasonable to expect them to work, as described by the Department of Social Security at the time: "the point at which a person should not be expected to work for benefit purposes".<sup>20</sup> This is still the basic principle which applies under ESA, with the legislation stating that the purpose of the WCA is to assess, on the one hand, whether a person's capability of work is "limited" and, on the other, whether "it is not reasonable to require him to work".<sup>21</sup>

However, this is quickly translatable into a discourse of objectivity which implies that those who "pass" the test are honest and deserving of social support, while those who "fail" the test are undeserving. This rhetoric of morality has carried through to the media reaction to assessment which has included headlines such as "Three-quarters of those *claiming* to be too sick to work are *in fact* fit and able to look for a job"<sup>22</sup> or "A shameful 78 per cent of people who applied for a new sick benefit were fit to work, *tests* have revealed".<sup>23</sup> These media reactions stress the scientific nature of the ESA assessment and imply that those who fail this scientific test are therefore undeserving. This reaction is not surprising and was predicted by some writers in advance of the implementation of ESA.<sup>24</sup>

Policy makers' discourse is more circumspect but is encased in a language of "rescuing" claimants from dependence on state benefits. For example, statistics showing that most claimants failed to qualify for ESA were accompanied by a press release with the headline: "New figures show thousands stopped from getting trapped on sickness benefit",<sup>25</sup> while a recent statement from the Employment Minister stated that the medical tests were about "saving lives not saving money".<sup>26</sup> These moral claims in relation to ESA are important in understanding the validity of decision-making processes, since they have such clear resonances in popular and policy-making circles.

The main principle behind the ESA assessment process is to create a bureaucratic mechanism which efficiently distinguishes between eligible and non-eligible claims, following clearly in Mashaw's model of bureaucratic rationality and, increasingly, since the 1990s, sidelining elements of professional judgement. The

<sup>19</sup> M. Berg, K. Horstman, S. Plass and M. van Heusden, "Guidelines, Professionals and the Production of Objectivity: Standardisation and the Professionalism of Insurance Medicine" (2000) 22 *Sociology of Health and Illness* 765–91; D. Cohen, M. Aylward, and S. Rollnick, "Inside the Fitness for Work Consultation: A Qualitative Study" (2009) *Occupational Medicine*; S. Hussey, P. Hoddinott, P. Wilson, and J. Dowell, "Sickness Certification System in the United Kingdom: Qualitative Study of Views of General Practitioners in Scotland" (2004) 328 *British Medical Journal* (2004).

<sup>20</sup> Department of Social Security, *The Medical Assessment for Incapacity Benefit* (London: HMSO, 1994), p.35.

<sup>21</sup> Welfare Reform Act 2007 s.8(1).

<sup>22</sup> *The Telegraph*, July 28, 2010, my emphasis.

<sup>23</sup> *The Sun*, October 27, 2010, my emphasis.

<sup>24</sup> C. Bambra, and K. E. Smith, "No Longer Deserving? Sickness Benefit Reform and the Politics of (Ill) Health in the UK"; C. Grover and L. Piggott "From Incapacity Benefit to Employment and Support Allowance: Social Sorting, Sickness and Impairment, and Social Security" (2010) 31 *Policy Studies* 265–82.

<sup>25</sup> DWP press release, October 13, 2009.

<sup>26</sup> *The Telegraph*, November 23, 2010.

values inherent in professional judgement remain theoretically in the role of the GP in verifying the initial claim and in the role of the medical assessor. The values inherent in the legal model of justice can be found in the appeals procedure where claimants can appeal to an independent tribunal.

## Research methodology

The research which has informed this article was a small scoping study on the early experiences of people claiming ESA. It focussed on the experiences of welfare rights advisers who have a front-line role in advising claimants about ESA. Their experiences provide a useful overview of the issues, while providing in-depth information on the everyday experiences of claimants. The research involved qualitative interviews with 18 advice workers from 14 organisations during June and July 2010. Organisations were identified using a snowballing technique to include a range of types of agency, including those that specialised in advising particular client groups and those with expertise in appeals work. Eleven of these agencies were local advice agencies based in different areas of Scotland and providing direct advice to the public. They included citizens' advice bureaux, local authority welfare rights advice teams, housing associations and voluntary sector organisations. Some organisations provided a generalist service while others specialised in advising particular groups such as lone parents, homeless people, people with learning disabilities, hospital patients, people with particular health conditions or people with mental health problems. Three interviews were also carried out with national organisations which have a "second tier" advice or policy role. Information was also gathered from reports published on the websites of national campaigning organisations, from responses to the call for evidence for the Harrington Review of the Work Capability Assessment, from policy documents and from attendance at a conference organised by the Child Poverty Action Group. Interviews were based on a broad interview topic guide, were fully transcribed and analysed using a thematic analysis with the aid of NVivo software. The Harrington Review, published in November 2010, has provided additional material for this article.

## The role of advisors in supporting claims for ESA

It is well established that those who seek advice about welfare problems are in the minority and that there are many more who either try to resolve problems on their own or put up with problems without taking action.<sup>27</sup> Advisers in this study were well aware of this problem and expressed considerable concern about the people who were not seeking advice. Since their own experience was that many claimants would only qualify for the benefit with professional help, they believed that there must be many others who were being left unsupported and not receiving the benefit they were entitled to. Their concern was that the system had been designed in such a way as to produce too many wrong decisions which could only be corrected on appeal. One adviser summed this position up as follows:

<sup>27</sup> H. Genn, *Paths to Justice: What People Think and Do About Going to Law* (Oxford: Hart, 1999); H. Genn, P. Pleasence, N. Balmer, A. Buck, and A. O'Grady, *Understanding Advice Seeking Behaviour: Further Findings from the LSRC Survey of Justiciable Problems* (London: Legal Services Research Centre, 2004).

“[the procedure]’s completely unreliable. The processes aren’t there. It’s only intervention that gets the right decision. If they don’t have support there must be people who don’t get anything. It’s a sham assessment process.” [interview 1]

Although many advice agencies rely on a reactive approach, where they see only people who seek advice, some of the advisers in this study, who worked for smaller specialist agencies, felt that their clients *would* come to see them whenever they got a letter from the DWP or if their benefit stopped. In these cases, advisers were fairly confident that they were seeing most of the people within their remit.

Advisers in this study helped people at every stage of their claims: from advising about initial claims, through helping with filling in claim forms, explaining letters from the DWP, attending the medical assessments, advising about decision letters and the options available to those refused the benefit, to drafting appeals, collecting additional evidence and representing at tribunal hearings. At every stage in this process, advisers emphasised claimants’ confusion and stress as to what was happening to them and their own role in helping to ease this. This help ranged from explaining more clearly to claimants what their position was, as many claimants were very confused, to technical advice relating to getting medical evidence through the legal aid system and representing at tribunal hearings. They particularly stressed their role in explaining the complexities of the benefits system and claimants’ confusion about the relationship between ESA, Jobseeker’s Allowance, Disability Living Allowance and other benefits such as Housing Benefit. However, their main role was in assisting claimants to present their case, either at the initial claim stage or at appeal, by helping people to show how their daily lives could be matched to the descriptors in the ESA legislation. Advisers stressed that they were attempting to get correct decisions: they were not encouraging claimants to lie or distort the truth. They were trying to counteract a flawed assessment system which is making costly mistakes, both in terms of Jobcentre Plus and Tribunals Service time and in terms of the claimants’ health and well-being:

“They [tribunal representatives] are just righting a wrong, that’s the thing about it, they’re not getting people who shouldn’t be on the benefits onto the benefits, they’re actually showing that these people should have got the points that would have allowed them to stay on that benefit, but the system itself now recognises that these people *are* unfit for work using quite a tough points system.” [interview 2]

As well as their concerns about the regulations for ESA and the way in which assessments were being carried out, advisers were also concerned about the day-to-day administration of the benefit. They emphasised their own “legal” knowledge of the system by giving examples of mistakes made by frontline Jobcentre Plus staff:

“The system has to work by the rules and how they [Jobcentre Plus] need to operate, and it really struck home that they just don’t know. And I’ve had a lot of cases and they just don’t know what they’re doing. They don’t.” [interview 2]



Advisers therefore saw their responsibility as helping people to navigate their way through a flawed system, using their specialist “legal” knowledge, and were concerned that claimants without access to such advice would be left helpless and without access to legitimate financial support.<sup>28</sup>

## Decision-making in ESA

The decision on individual claims for ESA is made by a decision-maker based at Jobcentre Plus, based on the evidence included in the claim. This evidence should include the claim form (ESA 50), the GP certificate, the report of the Atos medical examination and any other additional evidence submitted by the claimant. Advisers believed that decisions were being made solely on the basis of the Atos medical assessments, which describe which descriptors are met by the claimant. If the number of points awarded comes to less than 15 then claimants are found fit for work. The advisers did not believe that decision-makers take any other evidence into account or that they would ever consider doubting the medical assessment. Many advisers gave examples of this, such as:

“The decision makers are just going on what the healthcare professional says. I’ve got this woman who’s on methadone and the final conclusion was that she had no drug problem. I don’t see how that decision could have been made if they’d read the ESA 50 or the doctor’s certificate.” [interview 1]

There is a second opportunity for re-assessment by decision-makers if claimants appeal the decision. Most advisers believed that few decisions, if any, are revised by Jobcentre Plus before going to a full tribunal hearing, arguing that decision-makers would stick by the Atos report, whatever further evidence was submitted. The following adviser thought that its status as a “medical” report made it more valuable than anything else that the claimant might submit:

“I think they’ve been told because it’s based on a medical examination finding that that’s the best evidence there is.” [interview 6]

However, one adviser, who worked primarily with homeless people who often had mental health problems and/or addiction problems, had found that the decision-makers *would* reverse decisions before going to a tribunal if he submitted the right kind of evidence. Another described how on one occasion, appalled at the initial decision, he took matters more directly into his own hands:

“I contacted her GP who went ballistic. They all [various specialists] sent me reports, I took them next door to the Job Centre and said ‘I’m going on holiday today, I’m back a week on Monday, I expect to see her found unfit for work and on the support group by a week on Monday.’ And give them their due, when I went back a week on Monday she was on the support group.” [interview 9]

<sup>28</sup> This article does not address the question of what happens to people who ultimately fail to qualify for ESA although this was explored with advisers, who expressed considerable concern about this group.

The generality of advice workers' experience was that such revisions are rare and that the Atos medical assessment takes priority over all other types of evidence. These views are corroborated by third sector organisations responding to the Harrington Review of the Work Capability Assessment, for example by the Disability Alliance:

“We believe that DWP decision-makers should be encouraged to give greater weight to evidence from a person's own GP and/or consultant rather than solely the brief WCA.”<sup>29</sup>

and by MIND:

“The issues with the Atos assessors are particularly important because of the high regard in which their verdicts are apparently held by the Jobcentre Plus Decision Makers, who have the final say over which group an applicant is placed in. These Decision Makers are supposed to take all available evidence into account but seem to usually simply accept the recommendation of the Atos assessor.”<sup>30</sup>

Statistical reports from the DWP indicate that it is unlikely that decision-makers would come to a different conclusion from the Atos report:

“In some cases the JCP Decision Maker's final decision may differ from the Atos recommendation or the case may be returned to Atos for reconsideration. This change makes a very small difference to the published figures.”<sup>31</sup>

The Harrington Review confirms that, in the vast majority of cases (98 per cent), Jobcentre Plus decision-makers follow the advice of the Atos assessment<sup>32</sup> and reaffirms the view that “It is important to note that the advice from the Atos assessment to the Decision Maker is just advice”.<sup>33</sup> The Review concludes that the problem lies with a lack of confidence amongst decision-makers to challenge the views of Atos assessors and recommends “empowering” decision-makers to make better decisions, through training and confidence building.<sup>34</sup>

The actions of decision-makers are a good example of Mashaw's description of bureaucratic rationality, where the system encourages decision-makers to attempt to simplify and routinise decisions. The evidence produced by the medical assessment is more highly valued because it can be easily assimilated into quantifiable “objective” facts and also has the additional moral status of “medical” and therefore “scientific” evidence. This contrasts strongly with evidence provided by the claimants themselves, for example on the ESA 50 form, which is regarded as subjective and untrustworthy. The evidence provided by GPs, while having the moral status of “medical” evidence, does not have the strength of that provided by the “objective” Atos test. Harrington's solution to the apparent problem is to improve decision-making through training, rather than to question the difficult

<sup>29</sup> Disability Alliance, *The Work Capability Assessment Independent Review Call for Evidence Disability Alliance Response* (London: Disability Alliance, 2010), response to question 5.

<sup>30</sup> MIND, *Work Capability Assessment - Independent Review Response from Mind* (2010), p.6.

<sup>31</sup> DWP statistical release, October 2010, p.6, available at [http://research.dwp.gov.uk/asd/workingage/esa\\_wca/esa\\_wca\\_26102010.pdf](http://research.dwp.gov.uk/asd/workingage/esa_wca/esa_wca_26102010.pdf) [accessed January 2011].

<sup>32</sup> M. Harrington, *An Independent Review of the Work Capability Assessment*, p.48.

<sup>33</sup> M. Harrington, *An Independent Review of the Work Capability Assessment*, p.45.

<sup>34</sup> M. Harrington, *An Independent Review of the Work Capability Assessment*, p.53.

issue of how to weigh up different types of evidence. Sainsbury reminds us that assessments of fairness in administrative decision-making depends on how far we trust the decision-makers.<sup>35</sup> He argues that we are more likely to accept decisions made by professionals because they are professionals, while we are less likely to accept bureaucratic decisions, which do not carry the same level of respect. In the case of ESA, which depends on a medical judgment, the bureaucratic process *may* be acceptable so long as it relies on trustworthy professional judgements at the assessment stage. This leads us to consider how the evidence provided by Atos, which is so highly regarded by decision-makers, is created.

## Medical Assessments

By far the biggest criticism of ESA held by advisers lay with the medical assessments carried out by Atos Healthcare. Their opinion of the assessments was that they are perfunctory, inadequate and that they fail to take account of the claimant's own account of their problems or of any supporting evidence provided by GPs or other professionals. Many gave examples of cases where they had been astonished at the contrast between the Atos medical report's assessment of the claimant compared with what they knew about the person's health problems. Explanations for the inadequacy of the assessments concerned the qualifications and expertise of assessors and the "tick box" approach to assessment, whereby assessors follow computerized forms and do not spend sufficient time with claimants.

### *Qualifications and expertise of assessors*

The introduction of ESA changed the assessment procedure from one that was carried out by doctors to one which uses "approved health care professionals". While these professionals are expected to have a minimum level of qualifications and experience, advisers were concerned at assessors' apparent lack of appropriate qualifications and training. Many described cases where assessments of people with severe mental illnesses or addictions were made by assessors with no expertise in this area:

"It used to be doctors. I initially got the impression that if there were mental health problems you would get a doctor but that doesn't seem to be happening. Even with the mental health problems it seems to be a nurse" [interview 1]

"We've got nurses who are not qualified in mental health doing full mental health assessments including things that are quite breathtaking in our view, for example, we'll see a client who does have a CPN<sup>36</sup> allocated to them and the [Atos] nurse concluding and giving an opinion in the report that their condition is 'mild'." [interview 2]

<sup>35</sup> R. Sainsbury, "Administrative justice, discretion and the 'welfare to work' project", p.326.

<sup>36</sup> Community psychiatric nurse.

In contrast, one adviser who specialized in advising people with learning disabilities commented on the appropriate experience of the assessor on one occasion, stressing that this case was unusual and emphasizing the underlying problem of lack of expertise:

“I think we were quite fortunate in the person who was doing the interview because they’d worked with people with learning disabilities.” [interview 7]

The adviser went on to explain that the assessor’s experience meant that time was taken to understand the difficulties of people with learning disabilities, contrasting this experience with what usually happened at assessments. Although much of the criticism by advisers was of a lack of knowledge of mental health or learning disabilities, there were also examples of assessors lacking knowledge of physical impairments and medical conditions:

“A lady ... who’d had a gastric bypass ... went for her ESA medical, asked the doctor as soon as she went in what he knew about gastric bypasses and he went ‘nothing, I’m actually a psychologist’, now to me that’s ludicrous to have a psychologist sitting doing a medical examination interview when he has no idea about the medical procedures used in the operation and/or the effect.” [interview 9]

The Multiple Sclerosis Society has also commented on the lack of knowledge and training of Atos assessors, arguing that assessments of people with MS require specialists:

“Information on an application form which indicates that someone is seriously affected by a long-term condition like MS (particularly if they have a progressive form of the condition) should automatically trigger the gathering of further information from a specialist medical professional, such as an MS nurse.”<sup>37</sup>

Another concern about the medical assessments concerned the nature of evidence provided directly by the claimants during the assessment. Although many advisers felt that it was important for the claimant to contribute their own evidence during the assessment and criticised the assessors for failing to ask sufficient questions, there was also a concern that assessors appear to ask inappropriate questions about people’s daily lives and use it as evidence against their claim. This was explained in more detail by two advisers:

“Adviser 1: One of the individuals had been asked what kind of things they liked doing and they liked gardening and stuff like that, so they were put forward that they could go and do gardening, but the type of cancer they had in their legs, they couldn’t bend or do anything, so they actually couldn’t do it. So because they say they like stuff then they’re automatically getting put forward as fit for work.

Adviser 2: That’s the yes/no answer type thing, they’re not delving into the illness or not engaging with the patient to such an extent ...

Adviser 1: [they ask] ‘Can you do your garden?’

<sup>37</sup> Multiple Sclerosis Society, *Work Capability Assessment Review Evidence from the MS Society* (2010), p.7.

Adviser 2: Yeah, and [they should be saying] ‘that’s what you like but *can* you do it?’ ‘no I can’t’, [then they should ask] ‘why can’t you do it?’

Adviser 1: Yeah, they’re not asking the right questions.” [interview 13]

Other advisers explained that claimants will sometimes overemphasize their abilities because they do not wish to appear inadequate in front of the assessor and that this problem was particularly acute with people with mental health problems or learning disabilities. One adviser, specialising in mental health, described an assessment which he had attended:

“Quite often in these situations where people are in a medical interview, they do emphasise what they can do rather than what they can’t do ... So they tend to present well, better than they would if there was a more detailed medical assessment ... somebody can hold themselves together for 15 minutes for an interview, and then come out and collapse in a heap, you know. And I think the people that are doing the assessments just don’t pick up on that, which surprised me.” [interview 5]

This adviser was surprised that the medical assessor was not familiar with the problem of “presentation” and many others also argued that a proper medical assessment, carried out by people with the right expertise, would be able to take account of these realities of people’s lives. An adviser gave an example of how people are unwilling to discuss the realities of their lives when it might appear to make them look inadequate. The assessor would ask:

“‘So what about the dog, who takes it for a walk?’ You’re not going to say ‘I open the back door and throw it out and let it come back in’ because you’re frightened they’re going to come and take your dog away” [interview 14]

Another adviser, specializing in advising lone parents was also concerned that they are particularly vulnerable in this respect, since their need to present themselves as “good parents” will usually prevent them from telling the truth about the difficulties in their lives. Advisers, whose expertise partly depended on an understanding of the realities of benefits claimants’ lives, believed that assessors should also have this kind of relevant expertise and awareness.

The Harrington Review considers the qualifications and experience of assessors and, while endorsing the principles, raises concerns about assessors’ expertise in relation to specific medical conditions, in particular mental health problems and learning disabilities and proposes as a solution that “Atos should employ champions in mental, intellectual and cognitive disabilities”.<sup>38</sup> It proposes that the future reviews should examine in more detail the qualifications of assessors and consider whether a different “mix of professions” would be appropriate.<sup>39</sup>

These criticisms of the qualifications of assessors suggest that advisers value a professional model of decision-making, where professionals use their *relevant* professional knowledge and experience to provide evidence to make decisions about claims. The implication is that the blanket approach to using “approved health care professionals” is insufficient for achieving a fair outcome for claimants.

<sup>38</sup> M. Harrington, *An Independent Review of the Work Capability Assessment*, p.40.

<sup>39</sup> M. Harrington, *An Independent Review of the Work Capability Assessment*, p.46.

### *The “tick box” approach to assessment*

Advisers’ views of the inappropriate expertise of assessors was compounded by a view that medical assessments were driven by “tick boxes”, referring to the computerized form used by most medical assessors. Advisers argued that medical assessors were clicking on boxes on the form, without adding any explanation for their assessment and that this led to a computerized calculation of the number of points awarded and ultimately to a refusal of benefit. They argued that a more nuanced approach would lead to a better understanding of claimants’ difficulties. Advisers also offered numerous examples of “mistakes” being made in this process, where the assessor *had* apparently understood about a problem (evidenced by a statement somewhere else on the form) but then had ticked the wrong box:

“In one respect you almost feel sympathy for the medical examiner because they’ve got a set form that they have to follow and there seems to be no space to give opinion. It’s ticking boxes ... The paperwork then goes back to the decision maker and they make the decision only on the basis of the score, not on any comments.” [interview 7]

An adviser described how her own approach to helping people with claim forms differed from the approach taken by the medical assessors:

“We’ve been trained, you know, if you ask a question and you get a response, there’s maybe another three questions you should be asking. Whereas the [Atos] doctor’s asking a question and it’s black and white.” [interview 13]

The adviser explained that that the “tick box” approach to assessment lacked any element of personal contact with the claimants and that this was detrimental to an adequate assessment:

“They basically are sitting typing a report as they’re asking, they don’t know what they’re doing, they’re not really engaging with face to face stuff.” [interview 13]

This aspect of the assessment was illustrated by another adviser who, when asked how the assessments could be improved, demonstrated the problem:

“... speak to the client, not have your eyes like this [looks at computer screen] and asking a question. ... you’ve got to speak to the client, you know, and it’s not a tick box or yes or no or takes medication, gets out of bed, you know, stop and ask them.” [interview 14]

The use of the computer programme was addressed in a recent review of the procedure by the DWP and consideration was given to its appropriate use. The DWP review concluded that it was appropriate to use the “tick boxes” so long as the more flexible “free text” on the computer system was also used.<sup>40</sup> The Harrington Review is cautious about the use of computer software in the medical assessment but is unwilling to be very critical of the process, focussing instead on improving communication with claimants. For example its main criticism of the

<sup>40</sup> DWP, *Work Capability Assessment Internal Review: Report of the Working Group Commissioned by the Department for Work and Pensions* (2009), p.68. Available at <http://www.dwp.gov.uk/docs/work-capability-assessment-review.pdf> [accessed December 2010].

computer software is that the language used in reports “is not very intuitive or accessible to claimants who receive their final report.” It goes on to recommend that reports should include summaries written in plain English and not driven by computerised codes.<sup>41</sup> These recommendations may address some of the concerns identified but are unlikely to affect the criticisms levelled by advisers that the assessments are “driven by tick boxes”. Adler and Henman have noted that increasing computerization of social security decision-making leads to prioritization of a bureaucratic approach over the values found in professional decision-making.<sup>42</sup>

The Harrington Review supports these concerns about the “mechanistic” approach to medical assessments. Although it raises the possibility that assessments are not being carried out appropriately, it errs on the side of caution and focuses instead on how well decisions are communicated to claimants. Its recommendations concentrate primarily on ensuring that claimants understand how the assessment has been carried out, emphasizing that they should be aware of their “rights and responsibilities” in the process.<sup>43</sup>

Advisers’ criticisms of the medical assessments, supported by the Harrington Review, suggest that the qualities of professional decision-making, which would help to make the procedure more trusted, are being undermined by bureaucratic pressures to systemise and speed up the process. Harrington’s recommendations encourage putting more of a human face on the assessments and enabling better communication with claimants. There is an indication here of Adler’s “consumerist” model of justice which emphasises the role of consumer voice in the process.<sup>44</sup>

## Appeals

Moving on to looking at grievance mechanisms for dissatisfied claimants, the main mechanism in relation to ESA is an appeal to an independent tribunal (the First-tier Tribunal, Social Entitlement Chamber). All of the advisers interviewed had experience of appealing decisions on ESA, with varying degrees of success. Overall, appeals against refusal of ESA have a 40 per cent success rate,<sup>45</sup> but advisers reported much higher rates of success, ranging from “about 70%” to “most”. This probably reflects the general pattern that appellants who attend their appeals have higher levels of success than those who do not and that those who receive advice are more successful than those who do not.<sup>46</sup> Advisers’ view of the appeals system was that it is a much fairer assessment of people’s circumstances because the tribunals take account of a much wider variety of evidence. The Atos assessment is only one strand along with the claimants’ own description of her/his condition and any additional evidence provided by medical professionals or support workers. This, the advisers argued, leads to more accurate decisions. In most cases the appeal tribunal considers all the evidence carefully, often leading to an overturning of the decision. Advisers believed that it is the range of evidence presented at the

<sup>41</sup> M. Harrington, *An Independent Review of the Work Capability Assessment*, p.37.

<sup>42</sup> Cited in M. Adler, “Social Security and Social Welfare” in P. Cane and H. Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010), p406.

<sup>43</sup> M. Harrington, *An Independent Review of the Work Capability Assessment*.

<sup>44</sup> M. Adler, “Fairness in Context”.

<sup>45</sup> DWP statistics, October 2010, Available at: [http://research.dwp.gov.uk/asd/workingage/esa\\_wca/esa\\_wca\\_26102010.pdf](http://research.dwp.gov.uk/asd/workingage/esa_wca/esa_wca_26102010.pdf) [accessed January 2011].

<sup>46</sup> M. Adler, “Social Security and Social Welfare”.

appeal hearing and the tribunal's willingness to weigh up a range of possibly conflicting evidence that makes the difference, while some believed that tribunal members are particularly suspicious of the Atos reports:

"The appeal tribunals don't seem to apply any weight to the medical report. They start again and look at the claim from scratch. The medical members in particular don't seem to like the medical reports. That's partly a status thing: doctors and nurses." [interview 1]

Some advisers gave examples of appeal tribunals which had expressed considerable concern at the original decision, sometimes allowing the appeal without going so far as hearing, or by awarding as many points as possible to emphasise how wrong the initial decision had been. Although representatives tended to win most appeals, they were very concerned at the knock-on effects on claimants. Their experience was that appeals were taking around six to nine months to come to a hearing, causing considerable financial worry and stress to claimants in the meantime, even if they were successful eventually.

Appeals of course are characteristic of Mashaw's "moral judgement" model (and Adler's "legal" model), where the values of due process and the independent weighing of complex and often contradictory evidence are at the fore. This model of justice recognises the inherent difficulty of establishing "truth" and "falsity" and avoids the simplistic "box ticking" that the bureaucratic model favours. It is not surprising that this model is valued by welfare rights advisers, whose training and expertise lies in using the law to maximise claimants' chances of success. What is interesting here is the way in which they described their experiences at appeals. Advisers emphasised that appeals were more likely to come to "correct" decisions. The Harrington Review is somewhat more circumspect in its view of tribunal decisions. Although it accepts that many tribunal decisions overturn the original decision because they take account of a wider range of evidence, it also implies that some tribunal decisions erroneously favour the claimant's account at the expense of the Atos assessment and therefore recommends that "Tribunal decisions are better monitored."<sup>47</sup> Here Harrington has not appreciated the point made by Mashaw, that we should *expect* decisions to be made differently at appeal level, because appellate decisions use more sophisticated techniques, taking more careful account of competing accounts and inherently complex evidence.<sup>48</sup> This is appropriate at the appellate level and is useful for reconsidering difficult cases but, Mashaw argues, a high level of appeals may suggest that the initial bureaucratic decision-making process is not working.

## Complaints

As well as appealing against decisions with which they are unhappy, ESA claimants may also use complaints procedures to raise concerns about the way in which their claim has been processed. Some of the advisers in this study had experience of complaints procedures. Their general observation was that claimants were often happy with the way they had been treated at the medical but then were stunned to

<sup>47</sup> M. Harrington, *An Independent Review of the Work Capability Assessment*, p.60.

<sup>48</sup> J. Mashaw, *Bureaucratic Justice*, p.76.



see the decision and the, all too often, award of zero points. Other claimants had been unhappy with the assessment at the time and told advisers of bad experiences while others described the process as humiliating. This had led some advisers to advise clients to complain about the medical assessments but many had found difficulty in persuading clients to do so. One adviser had been more successful in encouraging clients to make complaints but felt that they were not taken seriously and would in any case make no difference to the outcome of the claim. What is clear from the administration of ESA, is that, although the complaints procedure is available to dissatisfied claimants, it is not primarily a procedure for challenging a *decision* about access to benefits and there is no apparent link between the Atos complaints procedure and Jobcentre Plus decision-making. Advisers noted that a complaint *could* lead into the decision-making process but that there is no mechanism for this to happen at present. DWP documentation does emphasise that complaints will be considered by DWP medical services and that any concerns about *individual* approved healthcare professionals could lead to their approval being withdrawn.<sup>49</sup> The Harrington Review found that there had been a relatively low volume of complaints about the Atos assessment, but that, in a small number of serious cases, complaints had led to the removal of professionals from the approved list.<sup>50</sup> The Review goes on to contrast the low level of complaints with the concerns raised by respondents to the Review:

“The information that this review has gleaned from Atos Healthcare concerning claimant satisfaction and complaints contrasts with the considerable concern, worry, even anger expressed in the written evidence to this review.”

The appropriateness of using the complaints procedure to challenge the actions of Atos assessors raises interesting questions about the role of grievance mechanisms in relation to different models of justice. Complaints procedures are relatively new mechanisms for raising concerns about administrative procedures but they have become popular since the rise of consumerism in public services and have been hailed as opportunities for organisations to learn from their mistakes.<sup>51</sup> Adler argues that complaints may fit within a professional model to the extent that professional decisions may be challenged by complaining to a professional body.<sup>52</sup> The problem with the professional judgements made during the assessment for ESA is that the professionals involved are heavily constrained by bureaucratic rules which leave little room for the type of discretion and context inherent in professional decision-making. This means that complaints under ESA are not complaints about professionalism but are more like the consumerist complaints described by Adler in his description of a consumerist model of justice, which stresses the role of consumer “voice” in the process.<sup>53</sup> Although this might enable them to have some voice in the *process*, it does nothing for their entitlement to benefits.

<sup>49</sup> DWP, *A Guide to Employment and Support Allowance — the Work Capability Assessment* (2008), p.6. Available at: [http://www.direct.gov.uk/prod\\_consum\\_dg/groups/dg\\_digitalassets/@dg/@en/@disabled/documents/digitalasset/dg\\_177366.pdf](http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/@disabled/documents/digitalasset/dg_177366.pdf) [accessed December 2010].

<sup>50</sup> M. Harrington, *An Independent Review of the Work Capability Assessment*, p.39.

<sup>51</sup> For further details, see J. Gulland, “Current Developments in the UK - Complaints Procedures and Ombudsmen” in M. Adler (ed.), *Administrative Justice in Context* (Oxford: Hart, 2010).

<sup>52</sup> M. Adler, “Fairness in Context”.

<sup>53</sup> M. Adler, “Fairness in Context”.

## Conclusion

Since this research was carried out, the Coalition Government's proposed welfare reforms and budgetary cuts have increased the pressure on welfare claimants. The planned "migration" of all claimants for Incapacity Benefit to ESA was in place before the new Government was formed and pilot transfers began in October 2010. This transfer will bring new challenges as far greater numbers of people with longer term health problems and different expectations of their benefit entitlement are moved into the new system.<sup>54</sup>

The Harrington Review is critical of the early implementation of ESA and expresses disquiet about some aspects of the descriptors for the work capability assessment and includes recommendations that they be reviewed in relation to mental health, learning disabilities and variable conditions. However it endorses the principle of using the WCA as a mechanism for assessing capacity for work. Other recommendations relate, in the main, to procedural details and emphasise improved communication with claimants as the priority.<sup>55</sup> The recommendations of the Review have been accepted in full by the Government and its response suggests a more "empathetic" and "compassionate" approach. The basic principles of the assessment are not expected to change and the response continues to use the language of "saving" people from dependency, while implying that some claims are bogus: "We do not wish to see people who are *genuinely* unable to work put in a position where they are expected to do so".<sup>56</sup>

The continued emphasis is on making more "accurate" decisions, implying that it is possible to make objective assessments of people's capacity for work, while failing to take account of the wider social context in which people live their lives. In the context of increased pressure on social security budgets and a discourse of tackling "dependency" the moral framing of people claiming sickness benefits as malingerers is unavoidable. This is not lost on claimants or their advisers, who see quite clearly that, not only do these decisions make a significant difference to their weekly income, but that they are also moral decisions on the extent of their malingering. Clearly if people have "failed" an objective test, then they must have been lying about their condition in the first place. This perception that "failing" the work capability test is regarded as a moral failing is confirmed by the Harrington Review, which, while showing some sympathy for claimants in this position, framed the problem as one of "communication", arguing that the solution is to ensure that DWP officials explain the process better and provide better information about the "support" available through Jobseeker's Allowance.<sup>57</sup>

There are of course other ways in which a system for allocating social security benefits could be devised and critics have argued that the policy obsession with "work first" is inherently unfair on people with disabilities and long-term health conditions.<sup>58</sup> One possible way of avoiding this would be to establish a system of

<sup>54</sup> The research project also addressed the question of what would happen with the transfer. All interviewees expressed concern at the effect on claimants as well as the considerable workload that this would produce, both for themselves and for the DWP and the appeals service.

<sup>55</sup> M. Harrington, *An Independent Review of the Work Capability Assessment*.

<sup>56</sup> DWP, *Government's Response to Professor Malcolm Harrington's Independent Review of the Work Capability Assessment Cm7977* (London: The Stationery Office, 2010), p.5, author's emphasis.

<sup>57</sup> M. Harrington, *An Independent Review of the Work Capability Assessment*, p.33.

<sup>58</sup> C. Barnes and A. Roulstone, "'Work' Is a Four-Letter Word; Disability, Work and Welfare" in A. Roulstone and C. Barnes (eds) *Working Futures? Disabled People, Policy and Social Inclusion* (Bristol: Policy Press, 2005).

social security which avoids the distinction between health-related “incapacity” or “limited capacity” for work and unemployment, as has been suggested in discussions of single working age benefits.<sup>59</sup> However, the most recent UK Government proposals on reform of the benefit system maintain this distinction, partly to enable contribution-based ESA to remain as a distinct benefit and partly to maintain the three levels of conditionality introduced by ESA, that is, no conditionality for the support group, limited conditionality for those with “limited capacity for work” and full conditionality for jobseekers.<sup>60</sup>

So long as the social security system requires an assessment of capacity for work it will have to be carried out in way which appears fair. Here models of justice can help us to understand the criticisms of ESA decision-making. Although the decisions about claimants’ entitlements to ESA are made by JobCentre Plus officials (suggesting the values inherent in a bureaucratic model), they appear to be strongly influenced by assessments made by “healthcare professionals” (which might imply elements of a “professional” model), but these assessments are heavily constrained by low-level bureaucratic rules which leave little room for the kind of judgements we would expect in a professional model. Although there are some elements of consumerism in the process, underpinned by the availability of a complaints procedure, this inspires little confidence in claimants or their advisers, who are concerned primarily with getting financial support, rather than being helped along the “customer journey”.<sup>61</sup> In a system where the power lies solely with the decision-makers, all this can do is to scratch around at the edges of “customer service”, leaving little in the way of justice. From a bureaucratic perspective the process has clear advantages: using stringent, apparently objective, criteria to distinguish between “true” and “false” claims, which, once processed by qualified assessors, can be easily processed by administrative decision-makers, while devaluing the evidence provided by professionals or claimants themselves. However, it also has disadvantages if it leads to a high volume of appeals to tribunals, which, using different criteria for assessment, overturn a high proportion of the original decisions. This is itself a costly exercise, undermining both the justice and the efficiency of the decision-making process as a whole. More importantly, however, it has a significant human cost for both successful and unsuccessful claimants.

<sup>59</sup> R. Sainsbury and R. Stephens, “A Single Core Benefit: Lessons from New Zealand” (2009) 16 J.S.S.L. 12–29.

<sup>60</sup> DWP, *Universal Credit: Welfare That Works* Cm.7957 (London: The Stationery Office, 2010), p.27. It is interesting to note that the proposed Universal Credit will also extend conditionality to those in work who are considered not to be earning enough or working sufficient numbers of hours and so in fact expanding the range of people subject to assessments of capacity.

<sup>61</sup> A term used in some DWP publicity on the procedure.